

Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROSHANAK ROSHANDEL, et al.,

Plaintiffs,

V.

MICHAEL CHERTOFF, Secretary, United States
Department of Homeland Security, et al.,

Defendants.

No. C07-1739-MJP

AGREED MOTION FOR CLARIFICATION

Noted for Consideration on May 23, 2008
Pursuant to CR 7(d)(1)

On April 25, 2008, the Court granted the Plaintiffs' Motion for Class Certification and certified the following class:

All lawful permanent residents of the United States residing in the Western District of Washington¹ who have submitted naturalization applications to the USCIS but whose naturalization applications have not been determined within 120 days of the date of their initial examination due to the pendency of a name check.

During the parties' subsequent conversations regarding language for a proposed class notice, it became clear that counsel for the parties are unclear on how to interpret the class definition articulated by the Court. Both parties, however, agree that no potential class member whose naturalization application was adjudicated prior to April 25, 2008, is a class member.

¹ The parties are in agreement that “residing in the Western District of Washington” means that an applicant was a resident of the Western District of Washington at the time the application was filed, or that the applicant subsequently moved into the Western District of Washington and informed USCIS of his or her change of address. Applicants who filed in the Western District of Washington but who have subsequently moved are not part of the class.

1 In order to assist the Court, the parties have each included a short argument in support of
 2 their respective positions, and respectfully ask the Court to issue an order clarifying the
 3 interpretation of the class definition:

4 **Plaintiffs' Position**

5 An order certifying a class is retroactive to the date the complaint was originally filed, see,
 6 e.g., County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991) (citations omitted), in this case
 7 October 29, 2007. Plaintiffs therefore understand the Court's certification order to encompass
 8 any and all lawful permanent residents residing in the Western District of Washington (1) who,
 9 on or after October 29, 2007, had waited more than 120 days from the date of their initial
 10 examination for an adjudication of their naturalization applications and (2) whose name checks
 11 remained pending on the 120-day anniversary of their initial examination.

12 Under defendants' proposal, a lawful permanent resident who applied for naturalization on
 13 January 1, 2005, was interviewed on June 1, 2005, and whose name check was purportedly
 14 completed before October 29, 2007 but whose naturalization application was not adjudicated as
 15 of April 25, 2008¹ would be ***excluded*** from the class. This unduly narrows the class. The
 16 people in that category are class members who waited beyond the 120-day deadline for
 17 defendants to act on their naturalization application and should not be excluded.

18 Plaintiffs' proposal is intended to identify ***all*** persons residing in this judicial district who
 19 have been injured by defendants' unlawful conduct. There should be no artificial cutoff date for
 20 class membership. The inquiry under the Court's class definition should simply be whether an
 21 applicant has waited more than 120 days after his or her interview because of a pending name
 22 check, not just the FBI portion of the name check process. Plaintiffs respectfully request that the
 23 Court clarify its class certification order accordingly.

24
 25
 26
 27 ¹ Defendants contend that a name check is completed when the FBI returns results to CIS. This position
 28 fails to account for CIS's processing of name checks, including, for example, situations in which CIS
 performs additional investigation based on the results of the FBI's results.

1 **Defendants' Position**

2 Defendants interpret the class definition slightly differently than Plaintiffs' interpretation,
 3 such that membership in the class is contingent upon the pendency of a FBI name check as of
 4 October 29, 2007. Thus, Defendants interpret the class definition to include all applicants who
 5 reside in the Western District of Washington, where (1) the applicant filed a naturalization
 6 application with USCIS; (2) the applicant was interviewed by USCIS and, as of October 29,
 7 2007, over 120 days had passed since the date of the interview; and (3) as of October 29, 2007,
 8 the results of the applicant's FBI name check had not been received by USCIS. Under
 9 Defendants' interpretation, only individuals whose FBI name checks remained pending as of
 10 October 29, 2007 are included in the class. Therefore, individuals whose FBI name checks were
 11 completed prior to October 29, 2007, and whose naturalization applications remain pending, are
 12 not part of the class. Any individual whose FBI name check was received by USCIS after
 13 October 29, 2007, and prior to the date the class notice is sent, is eligible to opt-out. Moreover, it
 14 is the Government's position that based on this Court's prior order, if an individual's name check
 15 is received by USCIS after the class notice is sent, he/she may opt-out at any time as well.

16 First and foremost, this case is and always has been about "delayed naturalization
 17 applications allegedly due to a pending 'name check' with the FBI." Order Denying Motion to
 18 Dismiss/Remand at 2. The Court found that Plaintiffs have alleged delay-based injuries
 19 stemming directly from this name check requirement resulting in Plaintiffs' inability to vote, to
 20 serve on juries, to travel freely, and to have jobs for which they are qualified. *Id.* at 7. The Court
 21 concluded that the existence of the name check policy within USCIS means that unnamed and
 22 future class members will face contested delays in the future. *Id.* at 7.

23 In the Court's order granting class certification, the Court stated that the claims of the
 24 named Plaintiffs are typical of those of the class because all of the potential class members
 25 experienced delayed naturalization adjudications due to the name check requirement. Order
 26 Granting Class Certification at 10-11. The Court's orders were specific to the delays caused by
 27 the FBI name check, and the class definition itself requires an applicant's delay must have
 28 occurred "due to the pendency of the FBI name check" for inclusion in the class. The

1 Government's interpretation – that individuals are not included in the class if an individual's FBI
 2 name check was received by USCIS prior to October 29, 2008 – is consistent with this Court's
 3 specific rulings and Plaintiffs' own class definition.

4 Moreover, this Court recognized that the Court's exclusive jurisdiction over section
 5 1447(b) petitions will suspend all pending individual naturalization applications falling within the
 6 class, including those whose name checks are completed during the pendency of this litigation.
 7 *Id.* at 11. The Court addressed this issue by allowing class members to opt-out of the class and
 8 stated that “[g]iven the potential for further delay in naturalization decisions as a result of the
 9 class action, potential members of the class may decide to opt-out and have their applications
 10 adjudicated by USCIS outside the context of this litigation.” *Id.* at 12. This language expressly
 11 shows the Court's interpretation of the class definition was the same as the Government's – the
 12 defining element of class inclusion is based on the completion of the FBI name check. It would
 13 then logically follow that any class member whose name check was received by USCIS prior to
 14 October 29, 2007, should not be included in the class because his/her application would have
 15 already moved forward in the process of adjudication.² The Court clearly intended to allow
 16 class members to receive a quick adjudication of their application once the FBI name check was
 17 completed, which is why it provided for the opt-out provision. For the Court to adopt Plaintiffs'
 18 request to broaden the scope of their own class definition would be inapposite of its own rulings.
 19 If the Court were to adopt Plaintiffs' newly asserted and all-encompassing class definition, the
 20 Court then would place a burden on those class members' by assuming jurisdiction and requiring
 21 them to opt-out before their applications can be adjudicated.

22 The Government anticipates that Plaintiffs may assert that the Government only chooses to
 23 interpret the class definition this way in an effort to reduce the class size. Such an assertion
 24 would be unwarranted because the Government bases its interpretations on the pleadings and
 25 briefing papers filed by Plaintiffs in this case and the Court's orders. The Government has
 26 consistently interpreted the class definition this way as evident in its Opposition to Class

27 ² Given that Plaintiffs' counsel agrees that anyone whose application was adjudicated prior to April
 28 25, 2008 is not in the class, the Government need not address the issue of applications adjudicated while
 in the Court's exclusive jurisdiction.

1 Certification, where the Government explained its interpretation of the class and stated that the
 2 class definition was problematic. *See generally* Opposition to Class Certification at 10-12.

3 More importantly, it is the Government's understanding that Plaintiffs' believe any delays
 4 are "attributable" to the FBI name check, so long as the applicant waited more than 120 days after
 5 his/her interview for adjudication, and therefore any such applicant is in the class. It is the
 6 Government's position, however, that the Court did not intend for such a broad definition. As the
 7 Government argued previously, the FBI name check is merely one step in the entire background
 8 examination process conducted by USCIS. For example, the wait could be because of the name
 9 check backlog, or because of the need for further evidence, or because of a fraud investigation, or
 10 for any number of other reasons. Even if the wait originally stemmed from the FBI name check
 11 itself, the case could still be with the FBI after the completion of the FBI name check because of
 12 a more extensive FBI investigation, or with USCIS for further investigation or processing.

13 This class was certified based on the understanding that the only reason for delay for class
 14 members was the FBI name check, and that all other statutory requirements were met on the
 15 applications. All prior representations from the Government about the number of pending
 16 applications that met the proposed class definition were made with this understanding, as this was
 17 what was alleged in the Complaint and class definition. Moreover, Plaintiffs' stance now
 18 expands the class definition because, in essence, their new definition would include every single
 19 application pending as of October 29, 2007, even if the applicants' name checks have already
 20 been completed by the FBI and the delay is no longer attributable to the wait for the FBI name
 21 check results.

22 Plaintiffs' proposed class definition never read, "All lawful permanent residents of the
 23 United States residing in the Western District of Washington who have submitted naturalization
 24 applications to the USCIS but whose naturalization applications have not been determined within
 25 120 days of the date of their initial examination." This, however, is how they now propose to
 26 interpret the definition. As such, the Court should construe the class to match the plain language
 27 of the definition proposed by Plaintiffs and adopted by this Court.

1 In addition, class members who are already covered by a previous existing settlement
 2 should not be considered a part of this class. Thus, any individual class member who may have a
 3 claim for loss of Social Supplemental Income (SSI) in addition to their 1447(b) claim would be
 4 excluded from this class because they are covered by the settlement in *Kaplan v. Chertoff*, Case
 5 No. 06-5304 (E.D. Penn.) (Settlement Agreement attached hereto as Exhibit A).³

6 In conclusion, the Government respectfully requests that the Court help the parties
 7 interpret the certified class definition in accordance with its previous orders basing the class
 8 certification on the pendency of an FBI name check. If the class definition is broader than how
 9 the Government's interpretation, the Government additionally requests that the Court's order
 10 include specific instruction as to determine who is included in the class.

27 ³ Plaintiffs' fourth cause of action regarding USCIS's failure to provide notice of remedies is
 28 precluded by the settlement agreement in *Lee v. Gonzales*, W.D. Wash., Case No. 04-449-RSL.
 However, no class was certified for this cause of action, so the *Lee* settlement is not relevant
 with respect to the interpretation of the class definition.

1 DATED: May 23, 2008.
2

3 STOEL RIVES LLP
4 Attorney for Plaintiffs

5 /s/ Rita V. Latsinova
6 RITA V. LATSIKOVA, WSBA No. 24447
7 600 University Street, Suite 3600
8 Seattle, WA 98101
9 (206) 624-0900
10 (206) 386-7500 (fax)
11 aaday@stoel.com
12 rvlatsinova@stoel.com

13 ROPES & GRAY LLP

14 /s/ Alfred Arthur Day
15 ALFRED ARTHUR DAY, WSBA No. 34926
16 One International Place
17 Boston, MA02110
18 (617) 951-7185
19 (617) 235-9684 (fax)
20 alfred.day@ropesgray.com

21 AMERICAN CIVIL LIBERTIES UNION OF
22 WASHINGTON FOUNDATION
23 SARAH A. DUNNE, WSBA No. 34869
24 AARON H. CAPLAN, WSBA No. 22525
25 705 Second Avenue, Third Floor
Seattle, WA 98104
26 206-624-2184 (main)
dunne@aclu-wa.org
caplan@aclu-wa.org

27 NORTHWEST IMMIGRANT RIGHTS
PROJECT
28 MATTHEW ADAMS, WSBA No. 28287
CHRISTOPHER STRAWN, WSBA No.
32243
615 Second Avenue, Suite 400
Seattle, WA 98104
206-549-4009 (main)
matt@nwirp.org
chris@nwirp.org

DATED: May 23, 2008.

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
ELIZABETH J. STEVENS
Assistant Director
District Court Section
Office of Immigration Litigation

/s/ Nancy N. Safavi
NANCY N. SAFAVI
Conditionally admitted in the W.D. Wash.
Trial Attorney
District Court Section
Office of Immigration Litigation
Civil Division
United States Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 514-9875
Fax: (202) 305-7000
Email: Nancy.Safavi@usdoj.gov
Attorneys for Defendants

JEFFREY C. SULLIVAN
UNITED STATES ATTORNEY

/s/ Rebecca S. Cohen
REBECCA S. COHEN, WSBA No. 31767
Assistant United States Attorney
U.S. Attorney's Office
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, Washington 98101
(206) 553-6526
Email: Rebecca.Cohen@usdoj.gov
Local Counsel for Defendants

1 CERTIFICATE OF SERVICE
2

3 I HEREBY CERTIFY that on May 23, 2008, I electronically filed the foregoing with the
4 Clerk of the Court using the CM/ECF system which will send notification of such filing to the
5 following CM/ECF participants:

6 Aaron H. Caplan
7 E-mail: caplan@aclu-wa.org

8 Alfred Arthur Day
9 E-mail: alfred.day@ropesgray.com

10 Christopher Strawn
11 E-mail: chris@nwirp.org

12 Margarita V. Latsinova
13 E-mail: chris@nwirp.org

14 Matt Adams
15 E-mail: matt@nwirp.org

16 Sarah A. Dunne
17 E-mail: dunne@aclu-wa.org

18
19 and I further certify that on the same date I caused to be mailed by United States Postal Service
20 the document to the following non-CM/ECF participants:
21

22 – 0 –
23

24 Dated this 23rd day of May, 2008.
25

26 _____
27 /s/ Jing Y. Xu
28 JING Y. XU
 Legal Assistant
 Office of the U.S. Attorney
 Seattle, Washington